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Arizona Corporation Commission

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OCT 15 2003

IN THE MATTER OF QWEST
CORPORATION'S COMPLIANCE WITH
SECTION 252(e) OF THE
TELECOMMUNICATIONS ACT OF 1996

DOCKET NO. RT-00000E-02-0271

DOCKETED BY

IN THE MATTER OF U S WEST
COMMUNICATIONS, INC.'S
COMPLIANCE WITH SECTION 271 OF
THE COMMUNICATIONS ACT OF 1996

DOCKET NO. T-00000A-97-0238

ARIZONA CORPORATION COMMISSION

DOCKET NO. T-01051B-02-0871

Complainant,

v

QWEST CORPORATION,

Respondent.

STAFF'S POST HEARING BRIEF**I. INTRODUCTION**

The Global Settlement Agreement ("Agreement") between Staff and Qwest is in the public interest. The Agreement resolves three Enforcement Dockets against Qwest which were initiated by Staff. The Agreement provides for both significant monetary and important non-monetary penalties. With respect to the monetary penalties, RUCO noted that no other settlement presented to the Commission has "involved this large a sum of money." Tr. pp. 30-31. Staff believes the significant monetary penalties contained in the Agreement are warranted given the nature of Qwest's conduct. The non-monetary penalties provided for under the Agreement are as

1 important as the monetary penalties in that they are designed to ensure that the conduct that
2 resulted in the initiation of the Enforcement Dockets, does not occur again.

3 The Commission should reject the claims of a few CLECs that the Settlement Agreement
4 should be rejected because it does not fully redress individual CLEC harm and claims of
5 damages. These claims are unfounded and mischaracterize the true focus of these proceedings.

6 **II. BACKGROUND**

7 **A. The 252(e) Proceeding**

8 On March 8, 2002, AT&T Communications of the Mountain States, Inc. and TCG
9 Phoenix ("TCG") (collectively "AT&T"), filed a Motion with the Arizona Corporation
10 Commission ("ACC" or "Commission") to determine whether Qwest was complying with Section
11 252 of the Telecommunications Act of 1996 ("the Act") given its having not filed certain
12 agreements with the Commission under Section 252(e) of the 1996 Act.

13 On April 8, 2002, the Staff of the Arizona Corporation Commission ("ACC" or
14 "Commission") opened the 252(e) Docket for the purpose of conducting an inquiry into whether
15 Qwest had complied with Section 252(e) of the Act.

16 Procedural Orders dated April 18, 2002, May 7, 2002, and May 20, 2002, directed the
17 parties to make various filings. Qwest submitted copies of the subject agreements on May 10,
18 2002. The Residential Utility Consumers Office ("RUCO"), AT&T Communications of the
19 Mountain States, Inc. and TCG Phoenix (collectively "AT&T") and Time Warner Telecom of
20 Arizona, LLC ("TWTA") filed Comments on Qwest's submission on May 24, 2002. Qwest filed
21 Responsive Comments on May 31, 2002. Staff filed its initial Staff Report on June 7, 2002.
22 Based upon the limited comments filed, Staff recommended fines, but did not believe that further
23 proceedings were necessary, since there was no evidence in the record at that time to indicate that
24 Qwest had acted knowingly and willfully in violation of its filing obligation.

25 On June 19, 2002, the Commission held a Procedural Conference for the purpose of
26 determining whether an evidentiary hearing was necessary and if so, the appropriate scope of the
27 proceeding. At the Procedural Conference, the Staff was directed to undertake further discovery
28

1 to determine whether there were additional unfiled agreements, oral or written, and the extent to
2 which the unfiled agreements may have acted to taint the record in the 271 proceeding.

3 Staff filed a Supplemental Staff Report on August 14, 2002. Staff recommended that the
4 252(e) proceeding be separated into two phases with Phase A addressing filing violations by
5 Qwest and Phase B addressing any opt-in disputes between Qwest and the CLECs. Staff also
6 recommended that the hearing in Phase A focus on whether Qwest knowingly and willfully
7 violated state and federal laws in not filing certain agreements with the Commission for approval
8 under Section 252(e) and appropriate penalties.

9 Staff also recommended in its Supplemental Report that the Section 271 issues be
10 addressed in the 271 proceeding itself and in a separate Sub-docket designed to address
11 allegations that Qwest's had through its unfiled agreements with certain CLECs, interfered with
12 the 271 regulatory process. Staff further recommended that the Sub-docket address the
13 appropriate monetary and non-monetary penalties which should be assessed upon Qwest for its
14 conduct.

15 In its November 7, 2002 Procedural Order, the Hearing Division accepted Staff's
16 recommendation to open a Sub-docket to the Section 271 proceeding for the purpose of
17 determining what actions the Commission should pursue with respect to the allegations that
18 Qwest interfered in the Section 271 regulatory process. Staff was ordered to cause such a docket
19 to be opened and file procedural recommendations for further Commission action.

20 In its November 7, 2002, Procedural Order, the Hearing Division also established a
21 procedural schedule for Phase A of the Section 252(e) proceeding which was subsequently
22 modified by Procedural Orders dated January 3, 2003 and February 11, 2003. The following
23 procedural schedule was established:

24	Intervenor testimony	January 21, 2003
25	Staff testimony/Intervenor	February 21, 2003
26	Response to other Intervenor testimony	
27	Qwest rebuttal testimony	March 7, 2003
28	Prehearing conference	March 13, 2003

Parties filed testimony and a hearing was held on March 17, 2003. Parties filed initial and reply briefs on August 14, 2002 and August 29, 2003 respectively.

B. The 271 Sub-Docket

On October 4, 2002, the ACC Staff filed a Supplemental Staff Report and Recommendation that summarized Staff's investigation into whether Qwest's agreements with certain CLECs (which precluded the CLECs' participation in the Section 271 proceeding) had tainted the record of the Section 271 proceeding. In its October 4, 2002 Staff Report, Staff recommended that the Commission open a Sub-docket to the Section 271 investigation for the purpose of addressing allegations of interference with the regulatory process and determining appropriate penalties.

Parties were ordered to file comments on Staff's proposed procedures for the Section 271 Sub-docket as set forth in the October 4, 2002 Staff Report, including the need for a hearing in the Sub-docket no later than December 10, 2002. By Procedural Order dated December 20, 2002, all letters, comments and data responses identified in the October 4, 2002 Supplemental Staff Report and Recommendation were made part of the Section 271 Sub-docket record. Parties were also given until January 10, 2003 to submit additional evidence.

Comments were filed by Eschelon, AT&T and WorldCom. Additional comments were filed by Qwest and RUCO.

Staff issued its Report and Recommendation in the 271 Sub-docket on May 6, 2003. On May 19, 2003, Qwest filed Exceptions to the Staff Report and Recommendation and requested a hearing on the penalties proposed by Staff. By Procedural Order dated June 19, 2003, the Commission scheduled a Procedural Conference for June 30, 2003, to discuss further proceedings.

On June 27, 2003, Qwest and Staff filed a Joint Motion to Extend the Time for Procedural Conference since they were in the process of negotiating a settlement agreement that involved the 271 Sub-Docket. ALJ Nodes granted Staff and Qwest's request to continue the Procedural Conference.

1 **B. Order To Show Cause For Delayed Implementation of Wholesale**
2 **Rates**

3 On December 12, 2002, in Decision No. 65450, the ACC issued a Complaint and Order to
4 Show Cause against Qwest Corporation ("Qwest"). That Decision ordered Qwest to appear and
5 show cause as to "(1) why its failure to implement the rates required by Decision No. 64922 is not
6 unreasonable, (2) why its implementation of rates in the other states with pending 271
7 applications at the FCC ahead of Arizona is not unreasonable, and (3) why its failure to notify the
8 Commission of the delay and seek relief from the Order is not unreasonable." Decision No.
9 65450 also directed Qwest to appear and show cause "(1) why it should not be held in contempt
10 of a Commission Order and assessed fines for failure to implement the rates approved in Decision
11 No. 64922 within a reasonable amount of time; and (2) why it should not be held in contempt of a
12 Commission Order and assessed fines deliberately delaying implementation of the wholesale rate
13 changes in Arizona until it had implemented the wholesale rate changes in at least nine other
14 states in which it has 271 applications pending at the FCC; and (3) why it should not be held in
15 contempt of the Commission for attempting to discourage parties from notifying the Commission
16 of its failure to comply with Decision No. 64922."

17 By Procedural Order dated March 4, 2003, the following schedule was established:

18 Staff Direct Testimony	March 27, 2003
19 Intervenor Direct Testimony	April 11, 2003
20 Qwest Rebuttal Testimony	May 8, 2003
21 Staff and Intervenor Reply	May 30, 2003
22 Pre-Hearing Conference	June 9, 2003
23 Hearing Commences	June 13, 2003

24 AT&T, Staff and Qwest submitted testimony and the hearing was held on June 13, 2003.
25 The parties filed briefs on July 15, 2003.

1 **D. The Combined Cases**

2 On July 25, 2003, Qwest and the Staff filed a Notice of Filing Settlement Agreement and
3 Request for an Expedited Procedural Conference in all three Dockets. On July 29, 2003, Qwest
4 and Staff filed a Joint Proposed Procedural Schedule. The Procedural Order consolidated the
5 three cases (hereinafter referred to as the "Enforcement Dockets") and reopened their records to
6 consider the Proposed Settlement. The following procedural schedule was adopted:

7 Staff and Qwest filed direct testimony August 14, 2003
8 Intervenors file testimony August 29, 2003
9 Staff and Qwest file rebuttal testimony September 8, 2003
10 Hearing Week of September 16, 2003

11 The parties filed testimony and the hearing to determine whether the Settlement
12 Agreement was in the public interest was held on September 16 and 17, 2003. Following is
13 Staff's Initial Post-Hearing Brief.

14 **III. THE SETTLEMENT AGREEMENT IS IN THE PUBLIC INTEREST**

15 **A. The Settlement Agreement Reaches a Reasonable Resolution of the Three**
16 **Enforcement Dockets Against Qwest That Were Initiated at Staff's Request**

17 The Settlement Agreement between Staff and Qwest reaches a reasonable resolution of the
18 issues raised in each of the three Enforcement Dockets and is in the public interest. The
19 Agreement provides for substantial monetary payments by Qwest of over \$20 million dollars split
20 between payments to the State Treasury, investments in projects to benefit consumers and various
21 credits to eligible Competitive Local Exchange Carriers ("CLECs").

22 The Settlement Agreement also provides for important non-monetary penalties designed
23 to prevent similar conduct by Qwest in the future and also resolves the appeal by Qwest of the
24 Commission's final order, Decision No. 64922, in the Wholesale Pricing Proceeding, Docket No.
25 T-00000A-00-0194, now pending in the U S District Court for the District of Arizona. (Case No.
26 CIV 02-1626)

27 Staff's goals during the negotiations were explained by Mr. Ernest Johnson, Director of
28 the Commission's Utilities Division:

1 "It was Staff's goal that the conduct at issue in the Litigation not be
2 repeated and that reasonably sufficient deterrent be established."

3 * * *

4 "...[I]t was important to Staff that Qwest conduct its business in a manner
5 which demonstrated respect for the regulatory process, specifically as it
6 related to the 271 regulatory processes. It was also important to Staff that
7 Qwest faithfully and timely implement commission orders and decisions.
8 Finally, it was important that Qwest make all necessary and required filings
9 mandated by section 252(e) of the Telecom Act of 1999.

10 In summary, Staff desired a commitment that Qwest would conduct all of
11 its business affairs before the ACC and in Arizona with integrity, honesty,
12 in conformance with Arizona laws and regulations and with respect for the
13 regulatory process of the Commission. It was Staff's view that such a
14 commitment would substantially reduce the probability that the concerns
15 alleged in the litigation would reoccur."

16 Ex. S-1, pp. 6-7.

17 Moreover, the Agreement provides for immediate recognition of benefits by the State,
18 CLECs and Arizona consumers. Absent the Agreement, all parties are unlikely to see any
19 benefits until after years of litigation has occurred.

20 Staff believes that the Settlement Agreement achieves each of the important goals
21 identified by Staff Witness Ernest Johnson, as well as others, and that it is in the public interest.

22 **B. The Monetary Penalties Provided For Under the Agreement are**
23 **Reasonable**

24 Staff believes that the monetary penalties provided for under the Agreement are
25 reasonable. As Mr. Johnson noted in his testimony, the minimum value of the Settlement
26 Agreement exceeds \$20 million dollars. S-1, p. 10. RUCO pointed out, "no other settlement
27 presented to the Commission has involved this large a sum of money." Tr. pp. 30-31. Given the
28 degree of culpability, Staff believes that a settlement of this magnitude is more than appropriate.

Staff Witness Matthew Rowell, Chief of the Telecommunications and Energy Section of
the Utilities Division explained the financial provisions of the Settlement Agreement in his
testimony. In paragraph 1 of the Settlement Agreement, Qwest agrees to pay \$5,197,000 to the
State Treasurer within 30 days of the Effective Date of a Commission Decision approving the
Settlement. The aggregate cash payment consists of three components: \$5,000,000 for the
allegations concerning Qwest's willful noncompliance with Section 252(e) and for Qwest's
alleged interference with the Section 271 regulatory process, \$47,000 for unfilled interconnection

1 agreements which Staff believes should have been filed pursuant to Section 252(e) but for which
2 Staff could not find that Qwest's actions were intentional and willful, and \$150,000 for delayed
3 implementation of the wholesale rates ordered by the Commission in Decision No. 64922. S-2,
4 Prefiled Direct Testimony of Matthew Rowell, pp. 2-3.

5 Section 2 of the Agreement provides for voluntary contributions of \$6,000,000 or more. It
6 is left to the Commission to decide or provide guidance on what portion of the \$6,000,000 should
7 be allocated to each of three categories: Charitable Contributions, Consumer Education on
8 Telecommunications Issues, and Infrastructure Investment including investment in unserved and
9 underserved areas. S-2, p. 3.

10 If the actual amounts paid to CLECs under Paragraphs 3, 4 and/or 5 is less than the
11 minimum amounts specified in those paragraphs, the differences are added to the Voluntary
12 Contribution amount. S-2, p. 4.

13 Finally, under Paragraphs 3, 4 and 5, eligible CLECs are entitled to a 10% Discount Credit
14 on Section 251 and 252 services, an Access Line Credit and a UNE-P credit. The minimum value
15 of the CLEC credits is approximately \$9.2 million dollars.

16 Staff Witness Johnson explained what Staff's goals were with respect to a financial
17 penalty and Voluntary Contributions:

18
19 "...Staff was interested in a financial penalty that would be substantial and
which would serve as a deterrent to Qwest."

20 * * *

21 "During the course of the negotiations it became clear that Qwest and Staff
22 would not reach agreement on an aggregate cash payment significantly
greater than the amount discussed previously. It was also clear that the
23 value of that cash payment was inadequate from Staff's perspective. Qwest
and Staff discussed various other items in an effort to resolve Staff's
24 concerns. Ultimately, the parties concluded that the public could benefit
through the establishment of certain voluntary contributions.

25 S-1, p. 9.

26 The Settlement Agreement's financial provisions were vigorously negotiated between
27 Staff and Qwest. In the end, neither Staff or Qwest received everything they desired in this
28 regard. However, Staff believes that both from an aggregate financial payment perspective and

1 when looking at each of the individual components that make up the aggregate payment, Staff's
2 objectives were met and that the penalties contained in the Agreement serve the public interest.
3 With regard to the financial elements of the Settlement Agreement, RUCO even acknowledged
4 that "the Settlement Agreement goes a long way to redress many of the grievances against the
5 company in these combined cases." RUCO-1, Prefiled Direct Testimony of Stephen Ahearn, p. 2.

6 Moreover, as will be discussed in more detail in later sections of this Brief, when
7 considering whether the Settlement Agreement is sufficient, Staff believes the non-monetary
8 provisions are equally important as well as the actions already taken by the Commission against
9 Qwest for its conduct in all three Enforcement Dockets.

10
11 **C. The Settlement Agreement Provides a Basis For Ensuring That Qwest Does
Not Engage in Similar Conduct in the Future**

12 The Settlement Agreement also contains many provisions that are designed to ensure that
13 Qwest does not engage in similar conduct in the future.

14 In addition to the recitals, Sections 8, 9, 12, 13, 14, 15 and 16 all contain measures which
15 are designed to ensure that Qwest does not engage in the same type of conduct which is the
16 subject of the Enforcement Dockets in the future. S-1, p. 11.

17 Sections 8 and 9 of the Settlement Agreement require Qwest to hire and pay for an
18 independent monitor to conduct an annual review of Qwest's Wholesale Agreement Review
19 Committee, an internal group within Qwest established to review all wholesale contracts to
20 determine whether they need to be filed with the Commission. S-2, p. 16. Qwest established this
21 Committee in response to the investigations into Qwest's compliance with Section 252(e) of the
22 Act. The scope of the monitor's annual audits will be determined by Staff with input from Qwest
23 and interested parties. Staff Witness Rowell explained the importance of this provision:

24 "Staff believes that the retention of an independent monitor is important
25 because it addresses the issue of ongoing compliance. Without a monitor
26 the Commission would have no way to ensure that Qwest's newly
established processes are adequate to prevent future occurrences of the
actions that are the subject of the Litigation."

27 S-2, p. 16.
28

1 Section 9 requires Qwest to continue its internal web-based training program concerning
2 compliance with Section 252(e).

3 Section 12 requires Qwest to pay for an independent consultant to provide independent
4 assessments to the Commission of improvements made to automate Qwest's wholesale rate
5 implementation process. S-2, p. 18. This provision was included due to Qwest's failure to
6 implement Phase II of the Generic Pricing Docket, or Decision 64922, within a reasonable time.
7 The consultant will be hired within 90 days of the *Effective Date* as the Agreement and will be
8 retained for a period of three years. The scope of the consultant's work will be determined by
9 Staff with input from Qwest and other parties. Id. p. 18. As Staff Witness Rowell testified:
10 "Without such a consultant the Commission would be unable to determine whether Qwest's
11 newly established processes are adequate to prevent future occurrences of the actions that are the
12 subject of the OSC docket." S-2, pp. 18-19.

13 Sections 13 and 14 of the Agreement also contain important measures designed to ensure
14 that future wholesale rate changes are implemented on a timely basis. Section 13 provides that
15 the Qwest Cost Docket Governance Team will continue for a period of three years from the
16 Effective Date.¹ S-2, p. 19. Section 14 of the Settlement Agreement requires Qwest to provide
17 notice of the status and time frames of wholesale rate implementation to the Commission and the
18 CLECs.

19 Section 15 of the Agreement is another important provision designed to ensure that Qwest
20 implements wholesale rate changes in the future on a timely basis. It requires Qwest to
21 implement the new rates within 60 days of the issuance of a Commission Decision that includes
22 the final price list. S-2, p. 20.

23 Finally, Section 16 of the Agreement was designed to ensure that Qwest does not use
24 secret agreements in the future to interfere with the Commission's regulatory processes. It
25 requires Qwest to file with the Commission any settlement agreements entered into in
26 Commission dockets of general application within 10 days of execution. All of these non-

27 ¹ The Cost Docket Governance Team is a team of executive level Qwest personnel whose
28 purpose it is to provide oversight for Qwest's improvements to the Wholesale Rate
Implementation Process and to act as an escalation point if necessary.

1 monetary provisions provide important assurances that Qwest will conduct its affairs in a lawful
2 and ethical manner in the future.

3 **D. The Settlement Agreement Provides Substantial Benefits For Arizona**
4 **Consumers and CLECs**

5 The Settlement Agreement's monetary and non-monetary provisions also provide
6 substantial benefits for both CLECs and Arizona consumers. The provision of direct benefits to
7 consumers recognizes that Qwest's conduct in the three Enforcement Dockets adversely affected
8 not only CLECs, but consumers as well.

9 Sections 3, 4 and 5 of the Agreement provide for various credits to eligible CLECs.
10 Together these credits total approximately \$9.2 million dollars. S-1, p.10. Another important
11 benefit associated with these provisions is that eligible CLECs can qualify for the discounts
12 without going through a lengthy and litigious process as may result under 252(i)'s opt-in
13 provisions or by bringing their claims in other forums.

14 Under Section 3, all eligible CLECs are entitled to a credit equal to ten percent of their
15 purchases of services covered by Sections 251(b) and (c) of the Act made during the time period
16 January 1, 2001 through June 30, 2002. Qwest will issue the credits to the eligible CLECs within
17 180 days of the Commission's Decision approving the Settlement. The credit is based upon the
18 provisions of agreements entered into between Qwest and McLeod and Qwest and Eschelon
19 which were the subject of the 252(e) proceeding. S-2, p. 9. As Staff Witness Rowell noted in his
20 pre-filed testimony, wholesale services specific to the provision of local service are covered by
21 Section 251(b) and (c) of the Act, including Unbundled Network Elements ("UNEs"), resale
22 services, and charges for collocation. S-2, p. 9. Intrastate access, interstate access, switched
23 access, special access, and private line are not covered by Section 251 (b) and (c) of the Act. S-2,
24 p. 9.

25 Under Section 4, eligible CLECs are entitled to an Access Line Credit of \$2.00 per month
26 for each UNE-P line and unbundled loop purchased by the CLEC between July 1, 2001 and
27 February 28, 2002, less amounts billed and collected by the CLEC from Qwest for terminating
28 intraLTA toll over those UNE-P lines and unbundled loops during the same time period. S-2, p.

1 10. The credits under Section 4 are based on the provisions of agreements entered into between
2 Qwest and Eschelon which were the subject of the Section 252(e) Docket. S-2, p. 10.

3 Under Section 5, eligible CLECS are entitled to a credit equal to \$13 per month for each
4 UNE-P line purchased by the CLEC between November 1, 2000 and June 30, 2001, and \$16 per
5 month for each UNE-P line purchased by the CLEC between July 1, 2001 and February 28, 2002,
6 less amounts billed by the CLEC from interexchange carriers for terminating intraLATA toll over
7 those UNE-P lines during the same time period. S-2, p. 12. The credits are based on the
8 provisions of agreements entered into between Qwest and Eschelon that were the subject of the
9 252(e) docket.

10 In addition, the CLECs will benefit by many of the other provisions of the Settlement
11 Agreement as well. The CLECs will benefit by Section 10 of the Agreement which provides that
12 any CLEC currently certificated and operating in Arizona can opt into the non-monetary
13 provisions (relating to Section 251(b) and (c) services) of any of the 28 interconnection
14 agreements (23 of which are terminated agreements) listed in Table 1 of the prefiled Direct
15 Testimony of Marta Kalleberg.

16 CLECs will also benefit by Section 11 of the Settlement Agreement which requires Qwest
17 to withdraw its appeal of Commission Decision No. 64922 involving Phase II of the Wholesale
18 Pricing Docket which is currently pending in the United States District Court for the District of
19 Arizona. Under the Agreement, Qwest is required to move to dismiss the appeal with 30 days of
20 the Effective Date of the Agreement.

21 CLECs also benefit directly from Sections 12, 13, 14, 15 and 16, which are the provisions
22 designed to ensure that Qwest does not engage in similar conduct in the future as that which was
23 the subject of the three Enforcement Dockets. These provisions are also designed to improve
24 Qwest's wholesale billing implementation processes, which will be of direct benefit to the CLECs
25 as well.

26 Finally, as will be discussed below, Section 2 of the Agreement (Voluntary Contributions)
27 provides substantial direct benefits to consumers and indirect benefits to CLECs, in many cases.
28

1 **E. The Settlement Agreement Is A Critical Component Along With Other**
2 **Actions Taken By The Commission In Restoring the Integrity of the**
3 **Commission's Processes**

4 In Staff's opinion, the Settlement Agreement, including its recitals, as well as a number of
5 other significant actions already taken by the Commission and Staff, taken together act to restore
6 the integrity of the Commission's processes. Important measures already taken by the
7 Commission which should be factored into any consideration of the sufficiency of the Settlement
8 Agreement in restoring the integrity of the Commission's processes, a concern expressed by
9 RUCO, include the following:

10 In the Spring, 2002, the Commission held Qwest's Section 271 application in abeyance
11 pending an extensive investigation to determine how many of Qwest's unfiled agreements had
12 acted to preclude CLECs from participating in the Section 271 proceeding and whether the record
13 of that proceeding had been tainted as a result. As a result of the discovery ordered by the
14 Commission, Staff held a Supplemental Workshop in July, 2002 to allow CLECs which believed
15 they had been precluded from participating in the Section 271 process to put their issues into the
16 record for resolution by the Commission. Several CLECs participated and Staff Reports were
17 later issued on February 25, 2003 and June 3, 2003 addressing each of their concerns. The
18 Commission subsequently adopted the Staff's recommendations, with modification, at a later
19 Open Meeting.

20 The Commission also took steps through the 252(e) docket to ensure that any ongoing
21 discrimination created by the Interconnection Agreements had been addressed before moving
22 forward with the Section 271 proceeding. Further, the Commission did not move forward with
23 Qwest's Section 271 proceeding until there were sufficient assurances in place from Qwest
24 (through the Settlement and otherwise) that it would never again engage in the type of conduct
25 that was the subject of the Enforcement Dockets.
26
27
28

1 **IV. THE COMMISSION SHOULD REJECT A FEW CLEC'S EFFORTS TO UNDO**
2 **THE SETTLEMENT BECAUSE OF THEIR BELIEF THAT THEY SHOULD BE**
3 **ENTITLED TO HIGHER PAYMENTS**

4 **A. The Focus of the Enforcement Dockets Was On Qwest's Conduct and**
5 **Penalties Commensurate with the Degree of Misconduct Found**

6 The focus of all three of the Enforcement Dockets has always been upon Qwest's conduct
7 and the appropriate penalties given the degree of culpability found. Contrary to the arguments of
8 AT&T and Time Warner, the focus has never been upon the identification and remedy of
9 individual CLEC harm or economic damages.

10 For instance, the scope of the 252(e) proceeding was set forth in the Hearing Division's
11 November 7, 2002 Procedural Order:

12 "The Section 252 issues concern whether Qwest violated its obligation to
13 file certain agreements with this Commission and if it did, what remedies
14 are appropriate. The scope of the hearing in the Section 252(e) proceeding
15 will determine when Qwest should file agreements with CLECs for
16 Commission approval, why Qwest failed to file certain agreements,
17 whether Qwest knew or should have known the appropriate criteria at the
18 time it failed to file the agreements, which agreements should be filed
19 under the standard and whether Qwest should be subject to monetary
20 and/or non-monetary penalties if it violated the standard. In addition, the
21 Commission should determine if Qwest's conduct violated any other law,
22 Commission Order or rule."

23 Order p. 5.

24 That same Procedural Order defined the scope of the Section 271 sub-docket:

25 "The Section 271 issues concern whether Qwest's agreements with certain
26 CLECs not to participate in the Section 271 proceeding interfered with the
27 regulatory process and whether the Commission should impose monetary
28 or non-monetary penalties as a result."

Id. p. 5.

The scope of the third Enforcement Docket, the wholesale billing OSC, was defined by
the Complaint and Order to Show Cause against Qwest issued on December 12, 2002. That
Decision ordered Qwest to appear and show cause as to:

"why its failure to implement the rates required by Decision No. 64922 is
not unreasonable, (2) why its implementation of rates in the other states
with pending 271 applications at the FCC ahead of Arizona is not
unreasonable, and (3) why its failure to notify the Commission of the delay
and seek relief from the Order is not unreasonable."

1 Decision No. 65450 pp. 8-9. ____.

2 Consequently, given the scope of each of the three Enforcement Dockets, Staff's focus has
3 always been upon Qwest's conduct, whether Qwest acted intentionally and willfully in certain
4 instances in violation of Commission processes and procedures and/or other state and federal
5 laws. In light of the above, to suggest that the focus of these cases was upon individual CLEC
6 harm and damages, as Time Warner and AT&T allege, is a mischaracterization of the
7 Commission's Orders.

8 This is not to say that Staff does not recognize that CLECs were adversely affected by
9 Qwest's secret agreements and that the provisions of any settlement should take this into
10 account. Staff did recognize this basic fact and did factor it into its negotiations with Qwest.

11 Related assertions by the CLECs (AT&T 1 at p.5) that the Agreement could not reflect
12 positions, priorities and principles the CLECs would want to see are simply unfounded. Staff
13 reviewed volumes upon volumes of documents, pleadings and other filing prepared on behalf of
14 CLECs, and was well aware of their positions, priorities and principles in its negotiations with
15 Qwest.

16
17 **B. AT&T and Time Warner's Claims That They Are Disadvantaged by
the Settlement Should Be Rejected**

18 AT&T and Time Warner urge the Commission to reject the Settlement Agreement
19 between Staff and Qwest largely for economic reasons. Various concerns were expressed at the
20 hearing and in prefiled testimony by AT&T and Time Warner that the level of the financial
21 penalties agreed to between Staff and Qwest was inadequate. AT&T and Time Warner were also
22 concerned that the direct financial benefits they were entitled to under the Settlement Agreement
23 was inadequate. These arguments should be rejected.

24 Staff initially recommended penalties of \$15,057,000 in the Section 252(e) proceeding,
25 \$7,415,000 in the Section 271 Sub-docket and \$189,000 in the Show Cause proceeding for total
26 penalties in the amount \$22,651,000. Exclusive of the CLEC credits, the payments provided for
27
28

1 in the Agreement are in the amount of \$11,047,000, or one-half of the total amount originally
2 recommended by Staff. In Staff's opinion, this is still a very sizeable penalty.

3 Further, while Staff had proposed total penalties in the amount of \$22, 651,000, there was
4 no guarantee that the Administrative Law Judge, or Commission would accept Staff's
5 recommendations in this regard. In addition, the Commission's fining authority has never before
6 been the subject of a judicial challenge, and Qwest was challenging Staff's interpretation of the
7 Commission's fining authority under A.R.S. Section 40-424. While Staff believes that its
8 interpretation of A.R.S. Section 40-424 is correct, there is no guarantee that a Court would
9 accept Staff's interpretation. As Staff Witness Johnson noted in his testimony:

10
11 "Litigation has risks; the outcome is ultimately determined by someone
12 else. There are times where litigants believe that it would be more
preferable to have certainty instead of uncertainty."

13 S-1, p. 3.

14 AT&T and Time Warner also took exception to Section 2 of the Settlement Agreement
15 in particular arguing that there was no basis for such a provision in the record and that these
16 funds should go to the CLECs instead of projects to benefit consumers. Staff strongly disagrees.

17 Qwest's actions in all three Enforcement Dockets not only adversely affected CLECs, but
18 consumers as well. Accordingly, the inclusion of Section 2 in the Agreement, a provision
19 designed to benefit both consumers (directly) and CLECs (indirectly), is entirely appropriate.
20 Moreover, Qwest had raised the issue of infrastructure investment as an appropriate form of
21 penalty in its testimony. While Staff Witness Kalleberg rejected a general provision for
22 infrastructure investment, the Settlement Agreement is more narrowly tailored than the original
23 proposal put forward by Qwest which Staff rejected and allows the Commission to select and
24 approve the particular projects for inclusion in Section 2.

25 Investment in particular areas of the State as well as telecommunications related
26 educational programs will not only produce a direct benefit to consumers, but an indirect benefit
27 to CLECs as well. For instance, AT&T Witness Pelto acknowledged on cross-examination that
28 educational programs designed to educate consumers on competition in the local service market

1 would be beneficial to CLECs. Tr. p. 286. Mr. Pelto also acknowledged that AT&T may be
2 eligible to utilize certain Section 2 infrastructure pursuant to Sections 251 and 252 of the 1996
3 Act; another indirect benefit to CLECs.

4 AT&T and Time Warner also believe that the Section 3 discount should cover intrastate
5 services, and that the Settlement Agreement should not be approved because it does not. Staff
6 notes that the 252(e) proceeding addressed Qwest's obligations under 251 and 252 of the
7 Federal Act, and the Settlement Agreement entitles the CLECs to an outright 10% discount on
8 those services for the relevant time period. While Staff Witness Kalleberg had advocated
9 inclusion of intrastate services in the 10% discount in her testimony, that was a **penalty**
10 recommendation only.

11 As discussed earlier, both AT&T (in its Testimony) and Time Warner (through its cross
12 examination at the Hearing) attempt to recast the focus of the three Enforcement Dockets to
13 proceedings intended to solely address individual CLEC harm and individual CLEC damages.
14 AT&T-1 p.5: Tr. 243-244. As noted earlier, this is simply not the case.

15 As already discussed, the scope of Phase A of this proceeding was defined by the
16 Commission's November 7, 2002 Procedural Order. Identification of individual CLEC harm and
17 individual CLEC damages was not among the issues listed.

18 Second, Staff believes that exact identification of individual CLEC harm, individual
19 CLEC damages or competitive harm in general is simply not possible with any precision.

20 Third, if these cases had indeed been focused upon the identification of individual CLEC
21 harm and damages, then Staff would have expected to see the CLEC present their own witnesses
22 at the 252(e) hearing so that those damages could be proven with a degree of exactitude. Yet,
23 only Staff, RUCO and Qwest presented witnesses at the 252(e) hearing.

24 Finally, both AT&T and Time Warner appear to believe that they are entitled to all
25 of the monetary benefits of the Agreements at issue without any of the attendant
26 obligations. This is simply not the case. Under the body of law which governs 252(i) opt-
27 in rights, the CLECs would have to establish that they are entitled to opt-in to the
28

1 agreements and they would also be required to take on the related obligations of the
2 Agreements in order to obtain the monetary benefits contained therein. Sections of the
3 Settlement Agreement contains neither of these prerequisite – any CLEC obtaining the
4 discount merely by having purchases 251(b) and (e) services during the relevant terms
5 period.

6 **C. Both Staff and Qwest have Agreed to Review of the Release**

7 Staff believes that the Release that was circulated by Qwest has caused a considerable
8 amount of confusion as to the nature and scope of the Enforcement Dockets.

9 This is unfortunate, because the primary purpose behind the Release as put to Staff was to
10 prevent double recovery by the CLECs. In other words, if a CLEC opted into the Settlement
11 Agreement, it should not be allowed to later go into a Court and sue Qwest based upon the very
12 same cause of action and recover a second time this would result in a windfall to the CLEC. As
13 offered in this fashion, Staff believes the Release is appropriate.

14 Staff does not believe that the Release should be overly broad but should be tailored to the
15 claims arising in the various Enforcement Dockets. Both Staff and Qwest have expressed their
16 agreement to the Staff and/or Commission reviewing and approving the terms of the Release.
17 Staff has even indicated its willingness to do so prior to approval of the Settlement Agreement.
18 Tr. p.345-346.

19 **D. The CLECs May Elect Not to Opt-in To the Settlement**

20 Any claims by the CLECs that they are disadvantaged by the Settlement or that their due
21 process rights were somehow violated, is quickly dispelled by the simple fact that no CLEC is
22 required to opt-in to the Settlement Agreement. That is, a CLEC may choose not to opt-in and
23 pursue its remedies elsewhere.
24

25 **V. THE PROCESS SURROUNDING NEGOTIATION OF THE SETTLEMENT AGREEMENT WAS REASONABLE**

26 **A. Staff Did Not Keep the Settlement Negotiations Secret**

27 Several parties attempted to cloak Staff and Qwest's settlement negotiations in a veil of
28 "secrecy", the result of some smoke-filled back room midnight talks designed to simply "cut a

1 deal". Infact, AT&T Witness Peltó went so far as to draw an analogy to the unfiled agreements
2 proceeding. These suggestions are misplaced and inappropriate.

3 Staff at no time attempted to keep the fact that it was engaged in Settlement negotiations
4 a "secret". If asked by any party, Staff would have shared this information...but Staff was never
5 asked.

6 Further to suggest that Staff was engaging in the same type of conduct as Qwest in
7 entering into unfiled agreements and not submitting them for approval with the Commission
8 simply misses the point. When asked on cross-examination, neither AT&T Witness Peltó or
9 MTI Witness Hazel could point to any rule or law that Staff had violated in simply entering into
10 settlement negotiations with Qwest. Tr. p. 280-281. In addition, Staff did not attempt to keep
11 the agreement secret from the active intervenors; but rather included these parties when it knew
12 that agreement with Qwest was likely.

13 In fact, AT&T Witness Peltó acknowledged that he believed it was reasonable for Staff to
14 first engage in conversations with Qwest, without the participation of other parties, in order to
15 determine whether settlement was even possible. Tr. p.280.

16 Moreover, the facts of this case together with the scope of the various Dockets all suggest
17 that some discussion between Staff and Qwest, without the participation of the other parties, was
18 called for. As Director Johnson pointed out, Staff had asked that all three of these Enforcement
19 Dockets be commenced against Qwest. Tr. p.330. Therefore, it was entirely appropriate that
20 Qwest approach the Staff (as the initiator of the three Dockets) to see if a settlement would be
21 entertained; and for Staff to engage in discussions with Qwest to determine if settlement was
22 even possible.

23 Other parties engage in settlement discussions all the time without Staff's involvement;
24 even though Staff is a party to the proceedings. A good example is the Qwest merger docket.
25 Even AT&T in that Docket entered into a confidential settlement agreement with Qwest. The
26 point is that once settlement is reached, such settlement agreements should not be confidential
27 and should be made available to other parties in the Docket.

1 **B. Staff Required CLEC Involvement When It Determined that A**
2 **Settlement with Qwest Was Likely**

3 At the hearing and in their prefiled testimony, AT&T, Time Warner, MTI and Arizona
4 Dialtone all complained that Staff had not included them in their negotiations with Qwest at an
5 earlier point in time. Tr. pp. 396-397. These CLECs attempted to portray the negotiations as
6 being "intense and unending" for a period of approximately two and a half months, at which time
7 the Staff, as an afterthought, suddenly decided to include the CLECs. See, Ex. TW-4. This
8 completely mischaracterizes the entire settlement negotiation process between Staff and Qwest.
9 Because of other responsibilities, Staff did not immediately call Qwest back after Qwest had
10 placed the initial call to inquire about settlement. In fact, it was sometime later that Staff finally
11 returned Qwest's call. In addition, the Director was gone for approximately a two week period
12 during this time.

13 Staff included the CLECs at the time when it had an outline of basic settlement principles
14 that both it and Qwest could agree upon. However, as Staff Witness Johnson pointed out:

15 "...[T]he outline was intended to serve as a basis for subsequent
16 agreement. It was not a final agreement. As I recall, during the meetings
17 and subsequent thereto, Staff discussed, proposed and made modifications
18 to the 'Outline of Principles.'"

19 Ex. S-1, p. 6.

20 Therefore, contrary to AT&T Witness Pelto's position that "Staff's positions had already
21 hardened through the negotiation process, which prevented any flexibility to incorporate
22 suggestions made by the CLECs", Staff was willing to discuss modifications to the final
23 agreement if a compelling argument was presented by any party. However, no one followed up
24 with Director Johnson on any of the issues raised in the settlement meetings.

25 At the hearing, much was also made of the fact that Staff had only invited "active
26 CLECs" to participate in the settlement talks once it was determined that settlement with Qwest
27 was likely. Tr. pp.396-397. This issue is a non-issue in this case, for the following reason.
28 Even after Staff docketed the Settlement Agreement with the Commission, no other CLEC
Intervenors came forward, than those that were originally contacted with any comments or to
participate in the hearing on the Settlement Agreement. Arizona Dialtone was not an intervenor

1 in any of the underlying dockets until August 7, 2003, approximately a month before the hearing
2 on the Settlement Hearing.

3
4 **C. Modifications to the Agreement Were Made to Take Into Account
CLEC Comment**

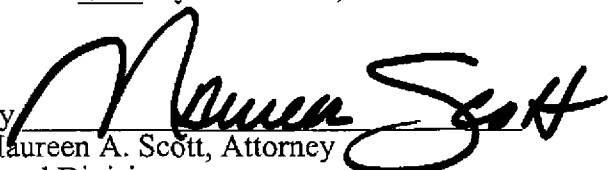
5 Several modifications to the Agreement were made as a direct result of the input by the
6 CLECs. Staff believes that these modifications to the Settlement Agreement improved it.

7
8 For instance, modifications were made to Sections 3, 4 and 5 based upon the CLECs'
9 comments. Modifications were also made to Section 2 based upon comments from RUCO.
10 Modifications were made to Sections 8, 12 and 15 based upon CLEC comments. This
11 demonstrates that Staff wanted to hear from the CLECs and address their concerns to the extent
12 it could.

13
14 **VIII. CONCLUSION**

15 Staff believes the Settlement Agreement is in the Public Interest and should be adopted
16 by the Commission. Complex and often conflicting issues can be resolved in different ways.
17 While the Settlement Agreement is not everyone's perfect solution to the issues raised,
18 nonetheless, it is a reasonable resolution of the three Enforcement Dockets.

19
20 RESPECTFULLY SUBMITTED this 15th day of October, 2003.

21
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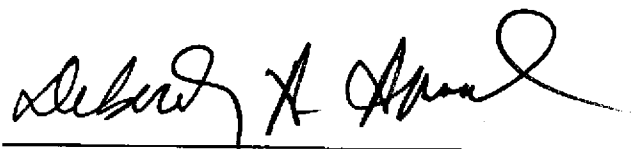
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